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No. 99-1136

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

JEFFREY D. PHILLIPS,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE FOURTH CIRCUIT, IN ACCORD WITH THE PLAIN LANGUAGE OF THE RELEVANT STATUTE, AND PRECEDENT FROM THIS COURT AND OTHER CIRCUIT COURTS, CORRECTLY HELD THAT THE SAFETY APPLIANCE ACT DID NOT APPLY TO A RAILCAR BEING ASSEMBLED INTO A NEW TRAIN.

2. WHETHER PHILLIPS HAS WAIVED HIS RIGHT TO A TRIAL OF HIS FORMERLY ABANDONED NEGLIGENCE CLAIMS.

PARTIES TO THE PROCEEDINGS

Petitioner Jeffrey D. Phillips ("Phillips") and Respondent CSX Transportation, Inc. ("CSXT") are the sole parties to this proceeding.

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IN THE
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October Term, 1999

JEFFREY D. PHILLIPS,

Petitioner

v.

CSX TRANSPORTATION, INC.,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent CSX Transportation, Inc. respectfully prays that Mr. Phillips' Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be denied.

STATEMENT OF THE CASE

The railroad has no dispute with Phillips' recitation of the proceedings below. The railroad does object to Phillips' arguing his case at Pet. 3-4.

More significantly, the record refutes some of the "additional facts" submitted by Phillips at Pet. 6. Phillips there claims that the "yard track" where Phillips was working was not a storage track. Phillips' sworn deposition testimony, part of the record before the Fourth Circuit, belies this contention:

> Q. What occurs on two receiving, what happens on that track?
>
> A. Inbound trains are, are stored there until they can be humped, outbound trains are stored there until the power [road engine] can be put on and the air tested ready for the outbound crew.

Phillips' Depo., p. 17, lines 6-11, (emphasis supplied).

The Affidavit of Phillps' co-worker, car inspector Kenneth Hogan, further emphasized the fact that Phillips' yard crew performed its work well before the railcar and train would be "in use", as required for application of the Safety Appliance Act (SAA), as explained by the Fourth Circuit. Hogan stated in part that "at no time is this test [the initial terminal brake test and rear car test] allowed to begin until the train crew [Phillips' yard crew] . . . has finished with that train, applying all of the handbrakes . . ." "and [has] abandoned the track". Moreover, "[N]o one from the [road crew] are (sic) allowed to move the train or allowed in the track for any purpose while . . . carmen are performing their predeparture inspections". This Affidavit was filed in the trial court, and contained in the Fourth Circuit record.

Phillips himself "supplemented" his deposition testimony with an Affidavit, after the railroad filed its Motion for Summary Judgment. In part, Phillips explained

that, once he had applied all necessary handbrakes, "the [yard] engine is disconnected from the train", so that the car department inspection can occur, and the road engine connected to the newly-formed train. Phillips admitted in the Affidavit that, because his injury occurred prior to all of the handbrakes being set, the yard engine "was still connected to the train" at the time of his injury. Phillips' Affidavit was also part of the trial court and Fourth Circuit record.

REASONS FOR DENYING THE PETITION

I. THE FOURTH CIRCUIT, IN ACCORD WITH THE PLAIN LANGUAGE OF THE STATUTE, AND PRECEDENT FROM THIS COURT AND OTHER CIRCUIT COURTS, CORRECTLY HELD THAT THE SAFETY APPLIANCE DID NOT APPLY TO A RAILCAR BEING ASSEMBLED INTO A NEW TRAIN.

Phillips' lengthy recitation of case law and policy considerations all begs the narrow issue presented by this case: does the Safety Appliance Act (SAA) 49 U.S.C. 20301 et. seq., have application to railcars being assembled, from storage, into a new train. The United States Court of Appeals for the Fourth Circuit, after an exhaustive review of the statutory scheme and relevant case law from this Court and other circuit courts, correctly concluded that the Act did not apply.

Initially, CSXT submits that Phillips has vastly overstated the alleged consequences of the Fourth Circuit's

decision. The decision does not remove "normal railroad switching operations" from the ambit of the SAA, whenever those operations occur during the train's trip, from its start to its conclusion. In fact, *Deans v. CSX Transportation, Inc.*, 152 F.3d 326 (4th Cir. 1998) held that the SAA did apply to a newly assembled train, when departure was "imminent".

All that the Fourth Circuit has done is to construe the words of the statute ("use . . . on its railroad lines") in a commonsense manner and consistent with established precedent, as CSXT will now demonstrate. Notably, Phillips himself heavily relies upon one of this Court's opinions which squares with CSXT's position, *Brady v. Terminal R. Ass'n. of St. Louis*, 303 U.S. 10 (1938), at Pet. pp. 16-17.

In *Brady* the Court was addressing the scope of the then-SAA ladder provision, which language at that time was similar to the handrail provision. The railroad raised the specific defense to the SAA claim that, at the time of Brady's

injury, the defective railcar was not "in use". Rejecting the railroad's position, this Court specifically found the car to be "in use" because it had been "placed on a receiving track temporarily pending the continuance of transportation", 303 U.S. at 13.

Had this Court's earlier case of *United States v. Erie Railroad Company*, 237 U.S. 402 (1915), discussed at length at Pet. 19-23, settled the "in use" question for all switching movements, including the assembly of a new train, then the *Brady* Court's stated rationale for finding "use" would be superfluous. Precisely because *Erie* did not extend the SAA to all switching movements, but only to those while the railcar was "in use", this Court had to address the issue in *Brady*.

Significantly, right after the quoted *Erie* language, at Pet. 20, Phillips does not discuss the nine cases there cited, eight of which involve railcars being switched during the

course of their trip, see *Johnson v. Southern Ry. Co.*, 196 U.S. 1 (1904); *Schlemmer v. Buffalo R. & P.R. Co.*, 205 U.S. 1 (1907); *St. Louis I.M. & S.R. Co. v. Taylor*, 210 U.S. 281 (1908); *Chicago B&O R. Co. v. United States*, 220 U.S. 559 (1911) (railroad "conceded" that the railcars at issue were "in use"); *Delk v. St. Louis & S.F.R. Co.*, 220 U.S. 580 (1911); *Southern R. Co. v. United States*, 222 U.S. 20 (1911); *and Chicago Junction Ry. v. King*, 222 U.S. 222 (1911). In *Minneapolis, St. P. & St. Ste. M.R. Co. v. Popplar*, 237 U.S. 369 (1914), it appears that the worker was injured while decoupling a car from a train in mid-journey, to place that car on a siding.

In the ninth case, *Southern R. Co. v. Crockett*, 234 U.S. 725 (1914), a switchman was injured when a switch engine, taking a railcar to be added to a freight train, became uncoupled from the railcar (on which Crockett was positioned), and the railcar ran into the already-assembled standing cars. This Court simply "assumed" that the

movement was "of interstate commerce" and noted that the switch engine's coupler was defective. As the switch engine's job is *per se* was to help build new, outbound trains, that particular railcar was "in use" because its job necessarily preceded completion of the train.

The cases of this Court cited by *Erie* and decided since *Erie*, demonstrate that *Erie's* language was *dicta.*, if applied to railcars being assembled into a new train. The Fourth Circuit merely adhered to the fact pattern and rationale of the pre and post-*Erie* pronouncements of this Court.

Phillips dredges up two more of this Court's cases in his Petition, but neither is supportive. In *Great Northern R. Co. v. Otos*, 239 U.S. 349 (1915), the railcar in question was "loaded", and "had not been withdrawn from interstate commerce, but merely subjected to a delay . . .", 239 U.S. at 351. And *San Antonio Ry. v. Wagner*, 241 U.S. 476 (1916) was decided "under the assumption, although we find nothing in

the record to show that, in fact, plaintiff was employed in interstate commerce at the time he was injured", 241 U.S. at 480.

Nor does this Court's decision in *Texas & Pacific Railway Company v. Rigsby*, 241 U.S. 33 (1916) command a different result, although a review of *Rigsby* may point up an alternative ground upon which the Fourth Circuit could have relied for its holding. Rigsby was a switchman, who was injured when he fell from a defective ladder while taking a string of "bad order" cars to a repair shop. It was the railroad's position that the language of then 45 U.S.C. 1 "use in interstate commerce", made the SAA inapplicable. This Court rejected the railroad's position and held that railcars moving only "intrastate" were also covered by the SAA.

Because *Rigsby's* holding was specifically that "interstate commerce" was not confined to "in interstate

traffic", it had application to train and railcar movements, but not to their status. Whether a train being assembled is "in use" at all was a separate and distinct question that this Court addressed in *Brady, supra.*

However, by his reliance on *Rigsby,* Phillips has opened up the issue of the language of the SAA as of the date of Phillips' incident, July 20, 1994. On July 5, 1994, 49 U.S. 20301 took effect, and the "interstate commerce" language was eliminated from the SAA. SAA jurisdiction for any and every appliance was therefore based on the railcar or train being "in use". Those words had been defined in *Brady,* and followed consistently in *Estes v. Southern Pacific Transp. Co.,* 598 F.2d 1195 (10th Cir. 1979); *Trinidad v. Southern Pacific Transp. Co.,* 949 F.2d 187 (5th Cir. 1991); and *Morris v. CSX Transp., Inc.,* 481 S.E.2nd 585 (Ga. App. 1997), to refer to assembled trains in the course of their trip or "imminently" to depart (*Deans*).

While the Fourth Circuit noted that 49 U.S. 20301 *et. seq.* was a self-proclaimed recodification, so as not to change prior law (*Phillips*, Fn. 1, at Pet. 5a-6a), there is no dispute that ". . . use . . . on its railroad lines - " has now become *de jure* the single term of status for the entire SAA, 49 U.S.C. 20302(a). If *Rigsby* ever did provide for a different scope for the SAA, it can no longer be considered authority for such. Of course, as explained *supra.*, *Rigsby* did not purport to address the definition of "use".

Given the remedial purposes of the SAA, Phillips attempts to have this Court expand the SAA beyond its plain words. This Court recently refused such an invitation in *Norfolk & Western Railway v. Hiles*, 516 U.S. 400 (1995) when it held that the SAA could not be invoked by a railroader injured during the drawbar aligning process, as the SAA's provisions were confined to the coupling process only. Black's Law Dictionary, Deluxe 7th Ed., (West Group 1999) at

p. 154 defines "use" as follows: [T]he application or employment of something . . . employment of a thing for the purpose for which it is adapted." When railcars are moving from point A to point B as part of a train hauling freight (or passengers) they are clearly in use; when awaiting the start of the trip, they may be the "iron horse at the gate", but they are not "in use". If Congress decides to broaden the SAA to include the assembly of new trains, it may do so, but this Court has correctly refrained from the judicial enactment of such a law.

II. PHILLIPS HAS WAIVED HIS RIGHT TO A TRIAL OF HIS FORMERLY ABANDONED NEGLIGENCE CLAIMS

Phillips concedes that he voluntarily abandoned his negligence claims "for purposes of economy", and reliance upon Phillips' perception of earlier case law. Phillips also concedes, as to the latter point, that CSXT had filed a cross-motion for summary judgment at the trial court (Pet., p. 7),

so he was well aware of the railroad's view of the SAA's application to this case.

What Phillips fails to tell this Court is, that in his Fourth Circuit brief, he did not request, alternatively, a new trial if he lost on the liability issue. Nor did Phillips brief the issue of his abandonment of the negligence claims. The issue has been conceded and waived.

CONCLUSION

Because the Fourth Circuit's decision clearly comports with the plain language of the SAA, both prior and after recodification, and with the many precedents of this Court and other Circuit Courts, there does not appear to be any ground for extraordinary review by this Court. And, as Phillips has not shown any basis in law or fact to resurrect his knowing and voluntary abandonment of his negligence claim, that trial tactic surely presents no issue for extraordinary review.

This 4TH day of February, 2000.

Respectfully submitted,

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APPENDIX

APPENDIX

PERTINENT TEXT OF STATUTES INVOLVED IN THIS CASE

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the several States or Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being

employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

* * * *

45 U.S.C. § 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

* * * *

45 U.S.C. § 56. Actions; limitations; concurrent jurisdiction of courts.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the

courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

* * * *

49 U.S.C. § 20301. Definition and nonapplication.

(a) Definition. In this chapter [49 USC §§ 20301 et seq.], "vehicle" means a car, locomotive, tender, or similar vehicle.

* * * *

49 U.S.C. § 20302. General requirements

(a) General. Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines --

(1) a vehicle only if it is equipped with --

(A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;

(B) secure sill steps and efficient hand brakes; and

(C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required,

secure handholds or grab irons on its roof at the top of each ladder;

(2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;

(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and

(5) a train only if --

(A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and

(B) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

* * * *

Former 45 U.S.C. § 4. **Grab irons or handholds for security in coupling and uncoupling cars**

Until otherwise ordered by the Secretary of Transportation, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons on handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

* * * *

Former 45 U.S.C. § 6. **Failure to equip cars as provided; duty of United States attorneys and Secretary of Transportation; exceptions from operation of provisions**

Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of sections 1 to 7 of this title, shall be liable to a penalty of not less than $250 and not more than $2,500 for each and every such violation, to be assessed by the Secretary of Transportation and recovered in a suit or suits to be brought by the United States attorney in the district court of the United States for the judicial district in which such violation occurred or in which the defendant has its principal executive office; and it shall be the duty of such United States attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Secretary of Transportation to lodge with the proper United

States attorneys information of any such violations as may come to his knowledge;

* * * *

Former 45 U.S.C. § 9. Power or train brakes; operation by engineer; rules for installation, inspection maintenance, and repair

Whenever, as provided in sections 1 to 7 of this title, any train is operated with power or train brakes not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said 50 per centum shall have their brakes so used and operated;

* * * *